Worksman Trading Corporation *and* Local 29, Retail, Wholesale Department Store Union, AFL-CIO. Case 29-CA-8163

January 20, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On July 15, 1981, Administrative Law Judge James F. Morton issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief,[1] and has decided to affirm the rulings, findings,[2] and conclusions [3] of the Administrative Law Judge and to adopt his recommended Order.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Worksman Trading Corporation, Ozone Park, New York, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] The Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

[2] Although alleged discriminatee Robert Thomas was told by the Respondent's vice president, Marc Woodsman, that the Respondent would promote him to "supervisor" of shipping and receiving, there is no contention and no evidence that Thomas was a statutory supervisor.

[3] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[4] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge any of our employees because of their activities on behalf of Local 29, RWDSU, AFL-CIO, or to discourage any employee from joining or supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under the National Labor Relations Act.

WE WILL offer to Robert Thomas, Juan Rivera, Joseph Lomuscio, Tyrone Townsend, and John Dantzler their jobs back and pay them all moneys they lost, plus interest, because of their unlawful layoff on July 14, 1980.

WORKSMAN TRADING CORPORATION

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge: On July 18, 1980, Local 29, Retail, Wholesale Department Store Union, AFL-CIO (herein called the Union), filed the unfair labor practice charge in this case, pursuant to which the General Counsel of the National Labor Relations Board was authorized to investigate the Union's contentions therein that Worksman Trading Corporation (herein called Respondent) violated the National Labor Relations Act, as amended (herein called the Act). On September 10, 1980, the General Counsel issued a complaint against Respondent alleging, among other things, that it violated Section 8(a)(1) and (3) of the Act by having discharged five of its employees because of their activities on behalf of the Union and in order to discourage the employees of Respondent from joining or supporting the Union. Respondent filed a timely answer. The pleadings, together with stipulations received at this hearing, placed in issue the alleged discriminatory discharges of those five employees. The hearing was held before me on April 27, 28, and 30, 1981, in Brooklyn, New York.

Upon the entire record, including my observations of the demeanor of the witnesses, and after due consideration of the oral arguments made by the parties at the close of the hearing and of the brief filed by Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The pleadings establish and I find that Respondent is an employer engaged in commerce within the meaning

of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent manufactures industrial and recreational bicycles. In 1980, it produced approximately 8,000 bicycles, 95 percent of which were made pursuant to special orders. Until late 1979, Respondent was located in a small plant in Brooklyn, New York. With assistance from the Urban Development Corporation, it relocated to a much larger facility in the borough of Queens, New York. The move was completed by January 1, 1980.

Irving Worksman owns 80 percent of the stock of Respondent. The remainder is divided evenly between his son Mark and another individual. Respondent is also owner of half of the stock of Precision Carting Company and had leased space to that company in 1980. The remaining stock in Precision Carting is owned by an individual, Dan Rossi—the Union's surprise witness at the hearing, as discussed below.

In the summer of 1980, Respondent had about 38 production and maintenance employees, none of whom were represented for collective-bargaining purposes by any labor organization.

The evidence offered by the General Counsel in his case-in-chief to establish that five employees were discriminatorily discharged was circumstantial in nature. The rebuttal evidence offered by Respondent raised relatively minor credibility issues. Virtually at the end of the case, however, the Union called as its only witness, Dan Rossi, part owner of Precision, as noted above. Rossi testified, as discussed in detail below, that he had a conversation with Respondent's officials shortly before the five discriminatees in this case were discharged and that he was told then of their intention to terminate the employment of those individuals because of their support for the Union. Rossi's testimony came as a surprise. Respondent then presented witnesses in its efforts to establish that Rossi was carrying out a threat to blackmail them. A major credibility issue was thereby presented. That matter is reviewed in detail, *infra.*

B. *The Discharges on July 14, 1980, and the Related Circumstances*

1. The work histories of the alleged discriminatees

The General Counsel called each of the five alleged discriminatees as witnesses. The first, Robert Thomas, testified as follows. He was hired on December 4, 1979, and assigned to Respondent's assembly department. After Christmas, he was moved to its shipping and receiving department. At that time, there were two other employees in the shipping and receiving department besides himself. By May 1980, Thomas was the only one regularly assigned to the shipping and receiving department. Of the other two employees who had been there, one had been transferred to the purchasing department and the other had left Respondent's employ. At one time, Plant Manager Donald Feis informed Thomas that Respondent was going to hire a supervisor for that department and also another helper.

The second alleged discriminatee was Juan Rivera. He testified that he had been hired in June 1979 as an assembler, that he received a raise in late 1979, and that he received another one a couple of weeks before he was discharged on July 14, 1980, as related below.

The third alleged discriminatee, Joseph Lomuscio, was hired by Respondent on December 3, 1979, and also was assigned to the assembly department. He received a $10 raise after he was employed for a month and he received a second raise in late April 1980.

The fourth alleged discriminatee, Tyrone Townsend, was hired by Respondent on March 18, 1980. He spent his first 5 or 6 weeks working in the tire department and then was transferred to the spray department.

The fifth alleged discriminatee, John Dantzler, was hired by Respondent as a welder.

2. The union activity

Robert Thomas testified for the General Counsel that he telephoned the Union's office in June 1980 and that, on the day after he called there, a representative from the Union, Al Green, came to see him while he was at work at Respondent's plant. According to Thomas, Respondent's president, Irving Worksman, came over to them while they were talking and Green began talking with Worksman as they left Thomas' work station. Thomas did not testify as to what, if anything, he heard them say to each other. Green did not testify at the hearing. Irving Worksman testified on other matters and made no reference to any discussion with Green.

Thomas testified also that he obtained union authorization cards from a leadman employed by Respondent who had been a member of the Union at one time. Thomas passed out those cards to a number of employees. The testimony of each of the other four alleged discriminatees indicates that they signed authorization cards for the Union in June 1980.[1]

Later in June 1980, one of the Union's business representatives, Joe Pave, met with Respondent's vice president, Mark Worksman, and asked that he recognize the Union as the bargaining agent for its production and maintenance employees. On Tuesday, July 8, according to alleged discriminatee Robert Thomas, Respondent's vice president, Mark Worksman, told him that he would be hiring two employees for the shipping and receiving department and that Thomas would be their supervisor. Mark Worksman represented Respondent at the hearing before me and also testified for Respondent. He did not controvert that aspect of Thomas' testimony.

Also, on July 8, the Union filed a petition in Case 29–RC–5038 whereby it sought an election among Respondent's production and maintenance employees. A copy of that petition was served by registered mail on Respondent. It was received by Respondent's president, Irving Worksman, on Monday, July 14. At the end of that workday, all five alleged discriminatees in this case were

[1] The testimony thereon is not especially precise but the significance is clear. For example, one of the alleged discriminatees testified he received a card one day, was asked to sign it and gave it back later that day.

notified that they were laid off under the circumstances disclosed below.

3. The discharges on July 14

Robert Thomas testified that he had been paid on the Friday of the preceding week in accordance with Respondent's normal practice and that nothing occurred on that Friday to suggest that he would be laid off on the next workday. On Monday, July 14, he worked again without incident until around 3:20 p.m. At that point, he was told by Respondent's plant manager, Donald Feis, that he was laid off. Thomas testified that he asked Feis why he was laid off and that Feis was at first hesitant and then mumbled something to the effect that business was slow. Thomas testified that, about 10 minutes later, he asked Respondent's vice president, Mark Worksman, why he was laid off. According to Thomas, Worksman stated that the reason was Thomas' ineffectiveness as a manager. Thomas testified that also present at that time were Respondent's president, Irving Worksman, coworker Willie Kennedy, and possibly another coworker, Timmy Murphy.

Thomas received a paycheck on Monday, July 14. That paycheck was for the day he worked during the preceding week and reflected also that he had received a wage increase for the hours worked that preceding week. Thomas testified that, in June 1980, he had asked Respondent's vice president, Mark Worksman, for a raise that he had expected to receive earlier that month and that Worksman told him then that he would be getting that raise.

The second alleged discriminatee, Juan Rivera, testified as follows as to his layoff. Respondent's plant manager, Donald Feis, told him on the afternoon of July 14, that he was terminated and he asked Feis why. Feis responded that he did not know. He then asked Feis to go to the office to get something in writing so that he would be able to file an unemployment claim. Feis went to the office and came out and told him not to worry about any such paper and that he was laid off because Respondent was overstaffed. Rivera received his pay for 2 days he worked in the preceding week and also for accrued vacation pay. Rivera had received a raise in pay just several weeks before he was terminated on July 14.

Alleged discriminatee Joseph Lomuscio testified that he was with Juan Rivera when Respondent's plant manager, Feis, told them that they were laid off. His account essentially parallels Rivera's. Lomuscio testified that his work had been praised on occasion by Feis and that another employee, Angelo Malafakis, was the least senior employee in Respondent's assembly department, where Lomuscio had worked.

Alleged discriminatee Tyrone Townsend testified that he saw the shop manager, Donald Feis, give Robert Thomas a paycheck on July 14 and he heard that Feis had told Thomas that he, Townsend, had to go. Townsend testified that he was thus laid off and that shortly afterwards he told Lomuscio and Rivera of his layoff. He testified that he, Lomuscio, and Rivera then spoke to Plant Manager Feis, and that Feis told them he had no idea what was going on. Townsend testified also that Feis went inside the office and asked for "pink slips" for Lomuscio, Rivera, and himself, and that Feis came out a few minutes later and said that they did not need pink slips to collect unemployment insurance as everything would be taken care of.

The last alleged discriminatee, John Dantzler, testified as follows respecting his layoff on July 14. He had worked through his lunch hour that day and finished work around 2:50 p.m. He came to the timeclock to punch out and noticed that his card was not in the time rack. He then went to the main office to see his supervisor and was told by one of the Worksmans to wait outside because the supervisors were having a meeting. About 10 minutes later, the meeting ended and his supervisor, Tossils, approached him and told him that he had to be laid off. Dantzler asked him why and Tossils responded that he did not know. Dantzler asked Tossils why he was being laid off as there were three others with less seniority than he in the welding department. Tossils responded that he did not know. Respondent did not call Tossils to controvert Dantzler's account.

C. *The Representation Case Proceedings*

As noted above, the Union had filed a petition to represent Respondent's employees. Respondent received that petition on July 14, 1980. On July 21, a hearing was held in that case. The transcript in that proceeding was received in evidence in the instant case. It discloses that Respondent's representative at that proceeding, its vice president, Mark Worksman, took the position that the five alleged discriminatees in this case had been "permanently discharged." The transcript of that representation case proceeding also discloses that Respondent sought to exclude the approximately six employees on its payroll who were actually performing work for Precision Carting Company, the firm jointly owned by Respondent and Dan Rossi. Further processing of the petition in that representation case has been blocked by reason of the matters involved in the instant case.

D. *Reasons Proffered by Respondent for Terminating the Employment of the Five Alleged Discriminatees*

Respondent contends that it had been overstaffed since December 1979, that that fact was readily evident since January 1980, and that the five discriminatees in this case were discharged as part of a long-term plan to alleviate its overstaffing problem. Respondent introduced various exhibits to establish that the national bicycle manufacturing business had been, by early 1980, in a downturn and that the projected outlook then for the bicycle business generally was not favorable. Testimony was offered by several of Respondent's witnesses that they had commented at various times to Respondent's Vice President Mark Worksman that Respondent's production and maintenance work force was overstaffed. One of those witnesses indicated that he so told Mark Worksman even before Respondent relocated its plant from Brooklyn to Queens in late 1979. Several employees testified that an individual named Robert Steinburger had observed the operations in detail in the plant around April 1980. They testified that Steinburger had told them that he was there to familiarize himself with the bicycle manufacturing op-

erations as he was going to Israel to manage a similar facility being established there apparently by Respondent. Respondent's vice president, Mark Worksman, testified that Steinburger told him that Respondent would do well to reassign five employees classified as floaters to permanent departmental assignments. Mark Worksman was so informed sometime around June 1980, according to Worksman's testimony.

Mark Worksman testified further that he met with the Union's business representatives in late June, as stated above, to discuss the Union's initial demand for recognition. Worksman testified that, also in late June, a meeting was held in his office among management personnel to discuss various problems. Worksman testified that he could not recall whether that management meeting occurred before or after his meeting with the union representative. Worksman testified that present at the management meeting were himself, his father, Irving Worksman, Sales Manager Wayne Sosin, Plant Manager Donald Feis, and the individual referred to earlier, Robert Steinburger. Mark Worksman testified as follows respecting the matters discussed at that meeting. Sosin began it by commenting on the industry forecast for the ensuing 6 months. Then Plant Manager Feis talked about material handling problems. Robert Steinburger suggested that Respondent was overstaffed and indicated that there were floaters who were working in excess capacity with no specific jobs. Irving Worksman indicated how important it was to cut down expenses and to be more conservative. There were discussions about the excessive heat loss in the building, that real estate taxes were high, and that overhead cost had to be cut. An understanding was reached that Mark Worksman and Plant Manager Feis would later set up a plan of action respecting what Worksman termed "the floater elimination" and that a long-term plan would be prepared for the following 6 months involving the discharge of from 7 to 10 employees. Mark Worksman stated in the meeting that "the Urban Employment people were going to become full wage people [and Respondent's] wage costs are going to go up."

The references to "full wage" pertains to the arrangement whereby the Urban Development Corporation subsidized the wages of some new employees during their initial training period. When such an employee works beyond that period, his wages are paid in their entirety by Respondent and he is then referred to by Respondent as a "full wage earner."

The testimony of Mark Worksman suggests that he considered the status of the alleged discriminatees and others in considering the matter of "overstaffing." At one point, he testified that, after that management meeting, he met with Plant Manager Feis but did not discharge any employees then as he had "some moral obligation to the city for some of the [employees]." It was not made clear to me why that concern vanished by July 14 or that the representation petition filed on July 8 had nothing to do with it. I was also confused by Respondent's evidence respecting its view as to the status of the alleged discriminatees as "full wage earners." Respondent's evidence initially indicated that their status as such had been reviewed in early July 1980 by Mark Worksman and that the payroll records considered by him then reflected that Joseph Lomuscio and Juan Rivera had become "full wage earners" on June 6, 1980, that John Dantzler would become a "full wage earner" on July 3, and that Robert Thomas would become one on July 3 and Tyrone Townsend on July 10. When Mark Worksman's testimony indicated that Rivera never had been employed under the plan Respondent had with the Urban Development Program, exact payroll data was procured at the hearing. Those records disclosed that Lomuscio became a full wage earner on March 6, 1980; Thomas became a full wage earner on March 25, 1980; Dantzler on April 7, 1980, and Townsend on July 1, 1980. Rivera was never employed under the plan Respondent had with the Urban Development Corporation; he was at all times in Respondent's employ a "full wage earner."

Worksman testified that he and Plant Manager Feis met sometime after the July 4 holiday to carry out the decisions reached at the management meeting discussed above. Worksman testified that, in his meeting with Feis, he informed him of the Union's demand for recognition and that the purpose of their meeting was in part to "get our act together" in the event the Union "came in." Worksman's testimony indicated that he and Feis reviewed various records and that they at that time had a written list containing the names of seven employees. Worksman testified that he knew that five of those people had to be discharged and he wanted to consider how best to do it. He testified that he discussed in detail with Feis the reasons why the names of those seven employees were on that list. Worksman testified that that list was considered over the following weekend and that on Monday, July 14, he and Feis met again and decided that they were going to discharge five employees and that Feis was responsible for discharging those employees. Mark Worksman testified that he held that meeting on July 14 with Plant Manager Feis after the coffeebreak which takes place around 10:20 a.m. Later in his testimony, Mark Worksman testified that, during the weekend preceding July 14, he himself had made the ultimate decision to discharge the five employees involved in this case.

Plant Manager Feis testified as follows respecting the discharge of the five employees in this case. The discussions he had with Mark Worksman about selecting employees to be terminated started in May or June 1980. On the weekend of the 4th of July vacation, he learned from talking with Mark Worksman that Respondent was going to lay off five, six, or seven people and he, Feis, gave Mark Worksman a list of nine people that he thought should be laid off. He initially did not recall exactly when he was told by Mark Worksman which five employees were to be laid off and when he was so told. He estimated that he was told on the day before the employees were actually laid off the names of those employees. Later, he testified that he had "probably" been told their names on the Friday preceding the layoff on July 14. He then testified that he learned the identity of the five when Mark Worksman told him on Monday, July 14, to lay off those employees. He testified that

Mark Worksman told him then that the reason for the layoffs was that Respondent was "overstaffed." He informed Tyrone Townsend, Juan Rivera, and Joseph Lomuscio when they were together at the timeclock of their layoff. He told him that the reason was overstaffing. When one of them asked him for a pink slip, he went back into the office to get one. He then talked to the bookkeeper and then came back to the employees and told them that they did not need any pink slips. The meeting he had with Mark Worksman on July 14 occurred at "9:00 o'clock or something," and that it was held before the coffeebreak.

Wayne Sosin and Irvin Worksman, sales manager and president, respectively, of Respondent, testified for Respondent at the hearing but did not make any reference to meetings with Mark Worksman or Danny Feis respecting the layoff or termination of the five employees in the instant case or of any other employees for "overstaffing."

Respondent placed in evidence charts to show that its overall productivity has remained stable, despite a reduction in personnel.

E. *Offers of Reinstatement by Respondent*

Respondent offered evidence which indicated that its vice president, Mark Worksman, discussed with several of the alleged discriminatees their reinstatement to employment with Respondent. It appeared that those discussions were held in January 1981. One of the alleged discriminatees testified that he was told that he could have his job back and several weeks backpay provided this case was withdrawn. Respondent's vice president, Mark Worksman, testified that he had contacted the five alleged discriminatees and had met with four of them. He testified that he took the initiative in this regard based upon his discussions with an agent at the Regional Office of the Board after he had made inquiry as to how best to "settle" the issues arising out of this case. Worksman's subsequent testimony clearly indicates that the discussions he had in January 1981 were all in the nature of settlement discussions.

At the hearing, I had overruled the General Counsel's general objection to Respondent's efforts to adduce testimony respecting reinstatement offers as the complaint in this case alleges that Respondent had failed to reinstate the alleged discriminatees. As the testimony that was developed at the hearing subsequent to that ruling discloses that the discussions between Mark Worksman and the alleged discriminatees were essentially settlement negotiations, they are not properly part of the record. I shall therefore on my own motion strike them from the record.[2]

F. *The Surprise Testimony of Dan Rossi*

As noted above, Dan Rossi was half owner of Precision Carting Company; Respondent owned the other half of its stock. Precision leased space at Respondent's plant and fabricated metal vending carts there. Its approximately six employees were listed on Respondent's payroll and were supervised directly by Rossi.

At the conclusion of Respondent's case, the General Counsel advised that he had no rebuttal witnesses. Counsel for the Union then called Rossi as a witness. As it turned out, Rossi's testimony was not in the nature of rebuttal evidence but rather it related to Respondent's alleged antiunion motivation in discharging the five employees in this case.[3] Rossi testified that, before the five employees in this case were discharged by Respondent in July 1980, he was approached by Mark Worksman and Irving Worksman and shown a list of seven names. He testified that Mark Worksman told him then that they had satisfied themselves as to the identities of the seven employees who were union supporters and stated that five of those employees worked for Respondent and the other two worked for Precision Carting Company. Rossi testified that Mark Worksman told him that he intended to discharge the five employees working on Respondent's operations and asked him to discharge the two performing work for Precision Carting. Rossi stated that he informed them that he would not discharge any of his employees. Rossi identified the five names listed on the sheet of paper he was shown by Mark Worksman in the summer of 1980 as the names of the five alleged discriminatees in this case.

Mark Worksman and Irving Worksman denied in essence having discussed the termination of the five employees in this case with Rossi. Respondent proffered testimony that, earlier on the day of the hearing, Rossi had had conversations with Respondent's Sales Manager Sosin, and its president, Irving Worksman, relative to a dispute existing between them as to the amount of moneys due Rossi by Respondent and as to Respondent's obligation, if any, to furnish Precision Carting Company with certain parts, particularly wheels. It appears that Respondent's lease of part of the premises to Precision Carting was canceled sometime after the five employees involved in this case had been discharged and that certain of its equipment was removed from the premises of Respondent. Of course, the relevant issue in this case is not the merit, if any, of Precision Carting's claims against Respondent, but rather the nature of the discussions between Rossi and Respondent's officials on the day of the hearing. In particular, Respondent contends that Rossi indicated to its officials sometime during the last day of the hearing that, unless Respondent gave in to his demand, he would fabricate testimony which would hurt Respondent in the instant case. Rossi testified that he had discussions with Respondent's representatives on the day of the hearing in an effort to resolve the particular matters involving Precision Carting and Respondent. The evidence is uncontroverted that it was Respondent's sales manager, Sosin, who took the initiative in meeting with Rossi on that day. He invited Rossi to lunch and suggested that Rossi contact Respondent's president, as Rossi

[2] *Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO (Altemose Construction Co.)*, 222 NLRB 1276, fn. 1 (1976). Cf. *Charles H. McCauley Associates, Inc.*, 248 NLRB 346 at fn. 2 (1980).

[3] The circumstances under which Rossi's account came to the attention of counsel for the Union are set out in the record. Those events and related matters warranted a full explication of the issue and the parties were given the opportunity to develop the issue completely.

did. Sosin asked Rossi to leave the hearing room and, in effect, not to testify.

It is uncontroverted that Rossi and Respondent were unable to resolve the differences between them. Rossi denied that he in any way sought to blackmail Respondent by threatening to give testimony adverse to Respondent in the instant case. He testified instead that he was present at the hearing because he had heard that the name of Precision Carting Company was mentioned on a number of occasions, as indeed it was, and that he wanted to see for himself what significance such references had with respect to the matters between Precision Carting and Respondent. He testified that he learned while attending the hearing that it involved the alleged discriminatory discharges of the five individuals in this case and he testified that he could not in good conscience leave the hearing without stating what he knew.

Rossi identified also the two employees of Precision Carting who he states were named by Mark Worksman in July 1980 as the "Union troublemakers." Those employees were John Modicowitz and Jose Lopez. He acknowledged that Respondent in fact had hired those two employees within the month preceding the date of the hearing in this case and that one of those had since left Respondent's employ.

G. *Analysis*

Many significant points in this case are not in genuine dispute. Thus, the evidence is uncontroverted that one of the alleged discriminatees, Robert Thomas, initiated contact with the Union and obtained authorization cards from them which he helped pass out. All five of the alleged discriminatees signed cards on behalf of the Union in June 1980. Later that month, Respondent's vice president had a breakfast meeting with Joe Pave, a representative of the Union during which the Union sought recognition from Respondent as bargaining agent for the production and maintenance employees of Respondent. The Union filed a petition for an election on July 8 which was served by registered mail on Respondent and received by it on July 14. At the end of that workday, the five alleged discriminatees in this case were told they were laid off under circumstances as to which there is general agreement. Other areas of testimony are in dispute and will be discussed herein.

In their closing arguments, the General Counsel and the Union observed that the preponderance of the evidence in this case requires a finding that Respondent discharged the five alleged discriminatees because of their activities on behalf of the Union. That contention is offered on two bases. The initial theory of the General Counsel is that the totality of the circumstantial evidence in this case impels a finding that these employees were discriminatorily discharged. The General Counsel, as does the Union, separately contends that the direct testimony of surprise witness Rossi respecting Respondent's antiunion motivation should be credited and, on that basis too, they assert that the violation must be found.

Respondent contends that it was at all times motivated solely by economic considerations, that its decision to cut back the size of its work force was due to the fact that it was "over staffed" and that that determination has clearly been supported by its subsequent productivity records which indicate that Respondent has been able to produce as many bicycles per employee as it had prior to the reduction in force.

I credit Rossi's testimony that he was told by Mark Worksman that Respondent intended to get rid of the five individuals named in the complaint in this case as the "Union troublemakers." Respondent suggests that his testimony should not be credited on the grounds that it was but a vindictive act on Rossi's part, resulting from Respondent's refusal to capitulate to Rossi's demands on its separate dispute with Rossi. While I have some reservations that Rossi acted entirely out of unselfish considerations, I am satisfied that he is not so foolish as to risk a citation for perjury to obtain some measure of revenge against a former business associate. In assessing whether Rossi was involved at the hearing in an effort to blackmail Respondent, as has been asserted, I have to take into account also that the evidence discloses that it was Respondent who took the initiative in arranging a meeting with Rossi on the day of the hearing and that it was Respondent's sales manager who suggested to Rossi that he should leave the hearing without testifying. In making the foregoing credibility resolution, I note also the improbabilities and the inconsistencies in Mark Worksman's account respecting the reasons for the termination of the five individuals in this case. The confused testimony as to exactly when and how Respondent selected those employees for layoff raises considerable doubt in my mind as to its veracity. Some of the inconsistencies are small but nonetheless revealing. Thus, Plant Manager Feis stated that he first learned of the decision to terminate the five individuals after he had given a list of nine names to Mark Worksman. Worksman made no reference to such a list but instead indicated that he himself had made up a list of seven names. Feis stated that he learned for the first time on the Friday before the Monday, July 14, of the identity of the five to be laid off and then modified that answer to state that he was told of the names of those five on the morning of July 14 around 9 a.m., *before* the coffeebreak. Worksman's testimony respecting the details as to selection of the five employees for discharge was most convoluted. Without belaboring it, I note that he finally said that the decision to terminate the five employees was announced to Feis on July 14, *after* the coffeebreak. His effort to convince me that he made the decision to discharge the five employees in this case before Respondent was aware that the Union had filed a representation petition was a failure. I also find most unconvincing and confusing Mark Worksman's testimony respecting his statement, on the one hand, that he did not take immediate action in early July to reduce the work force because he felt a moral responsibility to the city under the Urban Development Program. His testimony suggested that he wanted to wait until the employees involved had at least completed their training programs. As it turned out, several of the discriminatees named in the complaint had as of then long since completed their training programs and had been "full wage earners" for several months. In its brief, Respondent pressed its view that the five employees

were laid off because of overstaffing. The short answer to this is that Respondent had continued to hire employees long after it states it had become aware in January 1980 that it was overstaffed. For that matter, one of the very employees alleged as a discriminatee was hired in March 1980. I find no merit in Respondent's defense and conclude instead that the reasons it offered for the discharges of the five individuals in this case were pretextual.

In view of the activities of these five employees for the Union, the fact that Respondent was aware of the Union's activity, the timing of their discharges in relation to the filing of the Union's petition, the vacillating explanations given them on July 14 and the other circumstances (including the fact that several of the discriminatees received wage increases shortly before their layoff and that all were laid off without warning on the first day of the week), the pretextual nature of the reasons given by Respondent for having terminated those employees, and the credited testimony of Rossi, I conclude that those five employees were discharged because of their activities on behalf of the Union and because Respondent sought to discourage its employees from joining or supporting the Union.[4]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By having discharged the five employees named in the complaint in this case and by thereafter having failed and refused to reinstate them to their former positions of employment, because they engaged in activities on behalf of the Union and because Respondent sought thereby to discourage its employees from joining or supporting the Union, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act and Respondent has discriminated against its employees to discourage their activities for and membership in the Union and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.
4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It having been found that Respondent unlawfully discharged the five employees named in the complaint, I shall recommend that it be ordered to offer them immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of earnings and other benefits. Their loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest thereon as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

Upon the foregoing findings of fact and conclusions of law, upon the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[5]

The Respondent, Worksman Trading Corporation, Ozone Park, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging any of its employees because of their activities on behalf of Local 29, Retail, Wholesale Department Store Union, AFL-CIO (herein called the Union), or to discourage its employees from joining or supporting the Union.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action, which I find is necessary to effectuate the policies of the Act:

(a) Offer to Robert Thomas, Juan Rivera, Joseph Lomuscio, Tyrone Townsend, and John Dantzler immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent employment, and make them whole for all losses of pay they may have suffered as a result of the discrimination practiced against them in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facilities in New York, New York, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous

[4] This finding is obviously factual. Insofar as pertinent decisions set out appropriate guidelines, I have considered and compared them—e.g.—*American Spring and Manufacturing Co., d/b/a American Chain Link Fence Co.*, 255 NLRB 692 (1981); *Highway Express, Inc.*, 255 NLRB 668 (1981); and *Midwest Stock Exchange, Incorporated, et al.* v. *N.L.R.B.*, 635 F.2d 1255 (7th Cir. 1980), enforcement denied 244 NLRB 1108 (1979).

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein, shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order and all objections thereto shall be deemed waived for all purposes.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.